SOH CHEE GEE v. SYN TAI HUNG TRADING SDN BHD

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
NALLINI PATHMANATHAN JCA
ZABARIAH MOHD YUSOF JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-196-01-2017]
25 OCTOBER 2018

COMPANY LAW: *Director – Breach of fiduciary duties – CEO of company – Whether assumed fiduciary position – Whether CEO breached fiduciary duties owed to company – Whether losses solely attributed to CEO – Inadmissibility of source documents to prove amount of losses suffered – Whether rendered principle sum mere statement – Whether CEO proved to be in possession of company's monies – Whether imposition of constructive trust warranted*

TORT: *Damages – Liability – Breach of fiduciary duties – CEO of company – Whether assumed fiduciary position – Whether there was conflict of interest in transactions – Whether actions of CEO exposed company to real risk of loss – Whether acted to benefit of third party without knowledge of company – Whether CEO breached fiduciary duties owed to company – Whether subordinates held liable – Whether losses solely attributed to CEO – Whether CEO made profit or personal gains from transactions – Whether losses proven*

The appellant ('defendant') was employed by the respondent ('plaintiff') since 16 November 2000 and on 1 January 2009, he was appointed to the post of CEO. The defendant's post was rebranded 'Senior Vice President' but for all intents and purposes, he functioned as the plaintiff's CEO. The defendant's main responsibilities were to manage the plaintiff's daily operations and to ensure the continuous development of the plaintiff's business. In or around April 2013, the plaintiff's internal audit exercise raised several issues including issues relating to transactions with Cosmo Painters Sdn Bhd ('Cosmo'), a customer of the plaintiff. An independent investigative review turned up information which suggested that the defendant might have acted against the plaintiff's interest and as a consequence, the plaintiff commenced disciplinary proceedings against the defendant. After a domestic inquiry was conducted into the defendant's alleged wrongdoings, the defendant was dismissed from employment on 27 September 2013. The plaintiff's case against the defendant was based on transactions with Lotus Paints Sdn Bhd ('Lotus'), which supplied a product known as Lota Paints ('the product'), and Cosmo, which were both related companies. The plaintiff obtained the said product from Lotus and acting as Lotus' agent, marketed and distributed the said product to Cosmo and other customers at a certain profit margin. The defendant was alleged to have approved the extension of credit term for Cosmo from 30 days to 120 days

and Cosmo's application to increase its credit limit without proper documentation or due diligence and subsequently, when Cosmo exceeded its credit limit, the defendant continued to approve sales to Cosmo. The product was also delivered directly from Lotus to Cosmo without going through the plaintiff and it was unknown whether the product was delivered from Lotus to Cosmo as the defendant did not implement any system to verify the transactions. The plaintiff also discovered documents which showed that the defendant had been named as cheque signatories for Lotus and Cosmo. The plaintiff contended that as at 29 October 2013, the amount owed by Cosmo to the plaintiff was RM16,389,788.71. Both Cosmo and Lotus were wound up and the plaintiff thus suffered irrecoverable losses. The plaintiff thus filed a claim against the defendant for the losses it suffered as a result of the defendant's breach of fiduciary duties in failing to adhere to the plaintiff's credit policy. The High Court, in allowing the plaintiff's claim, found that the defendant was in breach of his fiduciary duties and that the plaintiff had proved that it suffered the sum of RM16,389,788 as losses. Hence, the defendant appealed.

Held (dismissing appeal; varying order of High Court)
Per Nallini Pathmanathan JCA delivering the judgment of the court:

(1) The plaintiff's claim was essentially premised on a breach of fiduciary duty by the CEO of the company. Section 132 of the Companies Act 1965 sets out in statutory form, the duties of a director. The defendant was not a director of the Board of Directors of the plaintiff and therefore, s. 132 which is specifically for directors was not applicable for an employee such as the defendant. However, as the defendant in his capacity as the CEO assumed a fiduciary position, the common law in relation to the duties and obligation of a fiduciary remains wholly relevant. (para 43)

(2) The defendant merely denied that there was a conflict of interest and asserted that there was no necessity for him to disclose it. The defendant also claimed that the accounts for which he was a cheque signatory had been dormant since 2006/2007. The explanation was insufficient to dispel the inference that there was a conflict of interest, especially since the actions taken by the defendant clearly showed that the defendant made decisions which benefited Cosmo and Lotus and exposed the plaintiff to real risk of loss, which materialised when Cosmo and Lotus were wound up and the plaintiff was unable to recover the debt owed by Cosmo to it. (para 55)

(3) The fact that the defendant held the post as cheque signatory was in contravention of his common law duty as an employee and gave rise to the presumption that the decisions of the defendant in relation to Cosmo and Lotus were not good business judgments. In attempting to disprove

the presumption against him, the defendant asserted that the accounts for which he was a signatory were dormant and that there was no proof of any pecuniary advantage gained by him. However, the defendant had an interest in Cosmo and Lotus as he was their cheque signatory. (paras 58 & 59)

(4) Cosmo and Lotus were third parties and the defendant should not have acted to the benefit of a third party without the plaintiff's knowledge. There was clear loss occasioned to the company by his allowing, what was in effect a financing scheme, for the benefit of Cosmo and to the detriment of the plaintiff, to be implemented over a considerable period of time. Therefore, the trial judge's finding that the defendant, as CEO, was in breach of his fiduciary duties owed to the plaintiff as his employer was upheld. (paras 59 & 65)

(5) There should not be an adverse inference drawn against the plaintiff for not calling the then Managing Director and Credit Manager as witnesses because the case against the defendant did not rest on any conspiracy between the defendant and those persons to gain personal benefit at the expense of the plaintiff. A director was not entitled to put the blame on his subordinates for his bad business judgment as he was the one who owed the company a fiduciary duty to act in the best interests of the company. The defendant may and did delegate the checking of supporting documents to his subordinates but ultimately, as the person who granted approval, the blame for extending the credit term and credit limit for Cosmo laid at his feet because it was a decision which only he had the authority to make. (60 & 61)

(6) There was no evidence produced before the court pertaining to the defendant's claim in mitigation that he had secured not only personal guarantees but also a corporate guarantee from Lotus, and that he had managed to recover some of the debt owed. In fact, one of the personal guarantors was already bankrupt at the time of signing the guarantee in 2013 and had been bankrupt since 1996. (para 64)

(7) As an employee, unless it can be established that he acted dishonestly and enjoyed pecuniary gains as a result of his misconduct, there was no legal basis to hold him liable for the totality of the losses that was not the thrust of the charges preferred against him; neither were such clear findings of fact made against him by the domestic inquiry panel. Hence, the defendant's liability for the entirety of the losses was not made out. The plaintiff also had not produced evidence as to whether the defendant had allegedly made, as profit or personal gains, from the transactions with Cosmo and Lotus. In fact, there was an increase in profitability between 2011 and 2012, after the defendant approved the increase in

credit term and credit limit to Cosmo. The party that directly benefited from the transactions was not the defendant but Cosmo and Lotus. There was also no suggestion of the defendant siphoning any of the money paid by the plaintiff to Lotus. Therefore, the trial judge erred in directly attributing the losses claimed solely to the defendant. (paras 67-69)

(8) In the grounds of judgment, the trial judge merely stated that the plaintiff had proved the sum as losses but did not refer to any documents in support of this finding. Since the source document, *ie*, the invoices which could prove that the plaintiff suffered the amount as losses were not allowed to be admitted as evidence, the principle sum remained a mere statement. Even if the invoices had been admitted in evidence, it did not follow that the defendant alone was solely liable for the losses suffered. The plaintiff did not prove that as a fiduciary, the defendant was in possession of monies belonging to the company which warranted the imposition of a constructive trust against him such that he was impelled to disgorge such profit in his possession. Therefore, part of the judgment awarding RM16,389,788.71 by way of damages to the plaintiff was set aside. The court granted declaration that the defendant had breached his express and/or implied duties and/or fiduciary duties to the plaintiff. (paras 71-73)

Bahasa Malaysia *Headnotes*

Perayu ('defendan') bekerja dengan responden ('plaintif') semenjak 16 November 2000 dan pada 1 Januari 2009, dia dilantik ke jawatan CEO. Jawatan defendan ditukar semula pada 'Naib Presiden Kanan' tetapi untuk semua niat dan tujuan, fungsinya masih sebagai CEO plaintif. Tanggungjawab utama defendan adalah menguruskan operasi harian plaintif dan memastikan kemajuan berterusan perniagaan plaintif. Pada atau kira-kira April 2013, pelaksanaan audit dalaman plaintif membangkitkan berbagai isu termasuk isu berkaitan transaksi dengan Cosmo Painters Sdn Bhd ('Cosmo'), salah satu pelanggan plaintif. Satu semakan penyiasatan bebas mendedahkan maklumat yang mencadangkan defendan mungkin telah melakukan tindakan bercanggah dengan kepentingan plaintif dan akibatnya, plaintif memulakan prosiding tatatertib terhadap defendan. Selepas siasatan dalaman terhadap salah laku yang dikatakan dilakukan defendan, defendan ditamatkan pekerjaan pada 27 September 2013. Kes plaintif terhadap defendan berdasarkan transaksi dengan Lotus Paints Sdn Bhd ('Lotus'), yang membekalkan produk yang dikenali sebagai Lota Paints ('produk'), dan Cosmo, yang kedua-duanya syarikat yang berkaitan antara satu sama lain. Syarikat plaintif memperoleh produk tersebut daripada Lotus dan bertindak sebagai ejen Lotus, memasarkan dan mengedarkan produk tersebut kepada Cosmo dan pelanggan-pelanggan lain pada margin keuntungan tertentu. Defendan didakwa meluluskan lanjutan terma kredit untuk Cosmo dari 30 hari pada

120 hari dan permohonan Cosmo untuk menambahkan limit kredit tanpa dokumen yang sepatutnya atau usaha wajar dan kemudian, apabila Cosmo melampaui limit kreditnya, defendan masih meneruskan meluluskan jualan kepada Cosmo. Produk juga dihantar terus daripada Lotus kepada Cosmo tanpa melalui plaintif dan tidak diketahui sama ada produk tersebut dihantar daripada Lotus kepada Cosmo kerana defendan tidak melaksanakan apa-apa sistem untuk mengesahkan transaksi tersebut. Plaintif juga menemukan dokumen-dokumen yang menunjukkan defendan dinamakan sebagai penandatangan cek untuk Lotus dan Cosmo. Plaintif menghujahkan setakat 29 Oktober 2013, jumlah yang dihutang oleh Cosmo pada plaintif ialah RM16,389,788.71. Cosmo dan Lotus, kedua-duanya telah digulung dan plaintif, dengan itu, mengalami kerugian yang tidak boleh diperoleh semula. Oleh itu, plaintif memfailkan tuntutan terhadap defendan untuk kerugian akibat pelanggaran tanggungjawab fidusiari defendan yang gagal mematuhi polisi kredit plaintif. Mahkamah Tinggi, dalam membenarkan tuntutan plaintif mendapati bahawa defendan telah melanggar tanggungjawab fidusiari dan plaintif telah membuktikan kerugian RM16,389,788. Oleh itu, defendan merayu.

Diputuskan (menolak rayuan; mengubah perintah Mahkamah Tinggi)
Oleh Nallini Pathmanathan HMR menyampaikan penghakiman mahkamah:

(1) Tuntutan plaintif, pada asasnya, berdasarkan pelanggaran tanggungjawab fidusiari sebagai CEO syarikat. Seksyen 132 Akta Syarikat 1965 menyenaraikan dalam bentuk statutori, tanggungjawab-tanggungjawab seorang pengarah. Defendan bukan pengarah dalam Lembaga Pengarah plaintif dan oleh itu, s. 132 yang khusus untuk pengarah tidak terpakai untuk seorang pekerja seperti defendan. Walau bagaimanapun, oleh sebab defendan dalam kapasiti sebagai CEO memikul kedudukan fidusiari, common law berkaitan dengan tanggungjawab dan kewajipan seorang fidusiari kekal relevan sepenuhnya.

(2) Defendan semata-mata menafikan terdapat konflik kepentingan dan menegaskan tiada keperluan mendedahkannya. Defendan juga menyatakan akaun-akaun yang dia menjadi penandatangan telah pun menjadi dorman sejak 2006/2007. Penjelasan tersebut tidak mencukupi untuk melenyapkan inferens bahawa terdapat konflik kepentingan, khususnya apabila tindakan-tindakan defendan jelas menunjukkan defendan membuat keputusan-keputusan yang menguntungkan Cosmo dan Lotus dan mendedahkan plaintif terhadap risiko kerugian sebenar, yang berlaku apabila Cosmo dan Lotus digulungkan dan plaintif tidak berupaya mendapat pemulangan hutang daripada Cosmo.

(3) Fakta bahawa defendan memegang kedudukan sebagai penandatangan cek bertentangan dengan tanggungjawab common law defendan sebagai pekerja dan membangkitkan anggapan bahawa keputusan-keputusan defendan berkaitan Cosmo dan Lotus bukan keputusan perniagaan yang baik. Dalam cubaan mematahkan anggapan terhadapnya, defendan menegaskan akaun-akaun yang dia menjadi penandatangan telah dorman dan tiada bukti apa-apa ganjaran kewangan diperolehinya. Walau bagaimanapun, defendan mempunyai kepentingan dalam Cosmo dan Lotus kerana dia ialah penandatangan cek mereka.

(4) Cosmo dan Lotus adalah pihak ketiga dan defendan tidak sepatutnya bertindak untuk faedah pihak ketiga tanpa pengetahuan plaintif. Jelas kerugian dialami syarikat apabila defendan membenarkan, apa yang sebenarnya skim pembiayaan, untuk faedah Cosmo dan merugikan syarikat plaintif, untuk dilaksanakan untuk satu tempoh yang agak lama. Oleh itu, dapatan hakim bicara bahawa defendan, sebagai CEO, melanggar tanggungjawab fidusiari terhadap syarikat plaintif sebagai majikannya, dikekalkan.

(5) Anggapan bertentangan tidak sepatutnya dibangkitkan terhadap plaintif atas kegagalan memanggil Pengarah Urusan dan Pengurus Kredit pada masa itu sebagai saksi-saksi kerana kes terhadap defendan tidak bersandar atas konspirasi antara defendan dan kedua-dua mereka untuk mendapatkan faedah persendirian dengan merugikan plaintif. Seseorang pengarah tidak berhak menyalahkan pekerja bawahannya untuk keputusan perniagaan yang salah kerana dia yang mempunyai tanggungjawab fidusiari pada syarikat untuk bertindak dalam kepentingan terbaik syarikat. Defendan boleh dan telah menugaskan pemeriksaan dokumen-dokumen sokongan kepada orang bawahannya tetapi, sebagai orang yang memberi kelulusan, dia yang perlu dipersalahkan kerana melanjutkan terma kredit dan had kredit untuk Cosmo kerana keputusan tersebut adalah satu keputusan yang hanya defendan mempunyai kuasa untuk lakukan.

(6) Tiada keterangan dikemukakan di mahkamah berkaitan tuntutan defendan dalam mitigasi bahawa dia berjaya mendapatkan bukan hanya jaminan peribadi malahan jaminan korporat daripada Lotus, dan dia berjaya mendapatkan semula sedikit hutang yang tertunggak. Pada hakikatnya, salah seorang penjamin peribadi telah pun bankrap pada masa jaminan ditandatangan pada 2013 dan telah bankrap semenjak 1996.

(7) Sebagai pekerja, kecuali boleh dibuktikan dia bertindak secara tidak jujur dan menikmati ganjaran kewangan hasil salah lakunya, tiada asas undang-undang untuk menjadikannya bertanggungan untuk keseluruhan kerugian yang bukan asas pertuduhan terhadapnya; dan bukan dapatan

fakta jelas sedemikian terhadapnya oleh panel siasatan dalaman. Oleh itu, liabiliti defendan untuk keseluruhan kerugian tidak dibuktikan. Plaintif juga tidak mengemukakan keterangan sama ada defendan mendapat keuntungan atau ganjaran peribadi daripada transaksi-transaksi dengan Cosmo dan Lotus. Sebenarnya, terdapat peningkatan keuntungan antara 2011 dan 2012, selepas defendan meluluskan kenaikan terma kredit dan had kredit untuk Cosmo. Pihak yang mendapat faedah secara langsung daripada transaksi-transaksi tersebut bukan defendan tetapi Cosmo dan Lotus. Juga, tiada cadangan bahawa defendan menyalurkan apa-apa wang yang dibayar plaintif kepada Lotus. Oleh itu, hakim bicara terkhilaf apabila menyalahkan defendan seorang untuk kerugian tersebut.

(8) Dalam alasan penghakiman, hakim bicara hanya menyatakan bahawa plaintif telah membuktikan jumlah tersebut sebagai kerugian tetapi tidak merujuk pada apa-apa dokumen menyokong dapatan ini. Oleh sebab dokumen sumber, iaitu, invois-invois yang boleh membuktikan plaintif mengalami kerugian jumlah tersebut, tidak dibenarkan diterima masuk sebagai keterangan, jumlah utama kekal menjadi pernyataan semata-mata. Jika pun invois-invois tersebut diterima masuk sebagai keterangan, tidak bermaksud hanya defendan seorang sahaja yang bertanggungan untuk kerugian yang dialami. Plaintif tidak membuktikan sebagai fudisiari, defendan mempunyai dalam milikannya wang milik syarikat yang mewajarkan pengenaan amanah konstruktif terhadapnya sehingga dia didorong menyerahkan kembali keuntungan dalam milikannya. Oleh itu, bahagian penghakiman mengawardkan RM16,389,788.71 sebagai ganti rugi kepada plaintif diketepikan. Mahkamah membenarkan deklarasi bahawa defendan telah melanggar tanggungjawab langsung dan/atau tersirat dan/atau tanggungjawab fidusiari pada plaintif.

Case(s) referred to:

Bristol and West Building Society v. Mothew [1988] Ch 1 ***(refd)***

The Board of Trustees of the Sabah Foundation & Ors v. Datuk Syed Kechik Syed Mohamed & Anor [2008] 1 LNS 100 FC ***(refd)***

University Of Nottingham v. Fishel and Another [2000] ICR 1462 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 132

For the appellant - VK Raj, Sri Devi Nair & SP Devi; M/s P Kuppusamy & Co
For the respondent - Jack Yow & Kwong Chiew Ee; M/s Rahmat Lim & Partners

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: 22NCVC-483-09-2015 (varied).]

Reported by S Barathi

A

JUDGMENT

Nallini Pathmanathan JCA:

Introduction

[1] This is an appeal by Soh Chee Gee ('the defendant') against the B decision of the High Court in allowing the claim against him filed by his former employer, Syn Tai Hung Trading Sdn Bhd ('the plaintiff') premised on the tort of breach of fiduciary duty in the course of the defendant's employment as the plaintiff's Chief Executive Officer ('CEO'). The plaintiff contended that the defendant's failure to adhere to the plaintiff's credit policy C had caused loss to the plaintiff company. The High Court agreed with the plaintiff's submissions and awarded damages to the plaintiff.

[2] We dismissed the defendant's appeal and affirmed the finding of the High Court that the defendant had breached the fiduciary duty which he owed to the plaintiff company in his capacity as the CEO. However, we D varied the decision of the High Court in that we disallowed the loss claimed in the sum of RM16 million odd because we found that the plaintiff had not succeeded in proving the same. The defendant sought leave to appeal to the Federal Court. We therefore set out the reasons for our decision below.

[3] The salient facts as set out below are largely adopted from the E statement of agreed facts and the submissions of both parties.

The Salient Facts

[4] The plaintiff is a company in the business of trading and distributing construction materials.

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[5] The plaintiff is a wholly-owned subsidiary of Petro-Pipe Industrial Corporation Sdn Bhd (PPIC) which in turn is a subsidiary of Wah Seong Corporation Berhad (WSC).

[6] The defendant was employed by the plaintiff on 16 November 2000. G Eight years later, from 1 January 2008, the defendant was appointed an executive director in the plaintiff company. The use of the term executive director refers to his position as an employee and not as a member of the Board of Directors. This is evident from the letter entitled "Promotion and Salary Adjustment" dated 15 December 2007.

H **[7]** As of 1 January 2009, he was promoted and appointed to the post of CEO. On 3 March 2010 the defendant's post was rebranded 'Senior Vice President' but for all intents and purposes he functioned as the plaintiff's CEO. In his capacity as the CEO, he occupied a fiduciary position *vis a vis* the plaintiff throughout the course of his employment.

I

[8] As the CEO, the defendant's main responsibilities were to manage the plaintiff's daily operations and to ensure the continuous development of the plaintiff's business. The defendant also checked, supervised and approved the financial reports which were prepared by the Head of the plaintiff's Finance Department which would monitor, study and make recommendations pertaining to the plaintiff's financial status. In addition, the defendant would conduct a credit evaluation of the plaintiff's customers after the plaintiff's Credit Control Department had checked, studied and commented on customer applications for credit facilities.

[9] In or around April 2013, the plaintiff's internal audit exercise raised several issues including issues relating to transactions with Cosmo Painters Sdn. Bhd. ('Cosmo'). An independent investigative review was commenced which turned up information which suggested that the defendant may have acted against the plaintiff's interest. As a consequence, the plaintiff commenced disciplinary proceedings against, *inter alia*, the defendant. After a domestic inquiry into the defendant's alleged wrongdoings, the plaintiff dismissed the defendant from employment on 27 September 2013. (The sequence of events is set out in full in paras. 23-28 below.) The plaintiff's case against the defendant is based on transactions with Lotus Paints Sdn Bhd ('Lotus') and Cosmo.

[10] Lotus is a company which supplies a product known as Lota Paints ('the product'). Cosmo is a customer of the plaintiff and it purchases the said product.

[11] Lotus and Cosmo are related entities. Their common shareholders are So Hwee Cheng (Rosalind) and So Chai Chueh. The former is a director of both Lotus and Cosmo while the latter is a director of Cosmo.

[12] The plaintiff company obtained the said product from Lotus and, acting as Lotus' agent, marketed and distributed the said product to Cosmo and other customers at a certain profit margin.

[13] Initially, Lotus granted the plaintiff a credit term of 30 days and the plaintiff granted the same term to Cosmo. In addition, the plaintiff imposed a credit limit of RM250,000 on Cosmo.

[14] On 14 January 2010, Cosmo submitted an application to the plaintiff to extend its credit term to 120 days.

[15] The defendant approved the extension of credit term for Cosmo to 120 days while the credit term granted by Lotus to the plaintiff remained at 30 days. This resulted in a 90-day time gap between the respective credit terms.

[16] In March or April 2010, Cosmo submitted an application to the plaintiff to raise its credit limit to RM1 million.

[17] The defendant also approved Cosmo's application to increase its credit limit and the plaintiff contended this was done without any proper documentation or due diligence. This enabled Cosmo to place larger orders with the plaintiff. This also resulted in the reactivation of Cosmo's accounts which had previously been suspended pending settlement of its debts to the plaintiff.

[18] Subsequently, even when Cosmo exceeded the credit limit of RM1 million, the defendant continued to approve sales to Cosmo.

[19] The said product was delivered directly from Lotus to Cosmo without going through the plaintiff. The plaintiff contended that it is unknown whether the said product was ever delivered from Lotus to Cosmo. This is because the defendant did not implement any system to verify the transactions.

[20] The payments which Cosmo were supposed to make to the plaintiff were set off against payments which the plaintiff was supposed to pay Lotus for the said product. The plaintiff contended that the time gap between the respective credit terms led to a Ponzi-like scheme whereby the plaintiff's monies were siphoned out to Lotus on the pretext of the commercial transactions between the plaintiff and Cosmo.

[21] Around October 2012, the plaintiff deposited four cheques from Cosmo amounting to the sum of RM1,784,250. All the cheques were dishonoured due to an insufficient balance in Cosmo's account. Since then, the plaintiff ceased all business transactions with Cosmo.

[22] From 2010 to 2013, the plaintiff had paid a total of RM10,536,040 to Lotus. When the transactions with Cosmo ceased in October 2012, there were no longer any invoices from Lotus to the plaintiff which could be used to off-set the invoices from the plaintiff to Cosmo.

[23] In or around August 2013, the plaintiff's holding company's internal audit team discovered the irregularities in the transactions with Lotus and Cosmo. The plaintiff engaged PKF Covenants Sdn Bhd ('PKF Covenants') to conduct an independent investigative audit.

[24] On 20 August 2013, PKF Covenants searched the plaintiff's safes located in the Finance Department and the defendant's office. It discovered documents namely undated Board of Directors' resolutions from Lotus and Cosmo, which named the defendant and one Chin Yoong Ngok (the plaintiff's Managing Director at the material time) as cheque signatories of those companies.

[25] In the meantime, the plaintiff issued a letter dated 2 September 2013 to the defendant to restrain the defendant from approving credit terms and executing contracts without prior consultation and written sanction from the Acting Chief Financial Officer and CEO of the Industrial Service Division for WSC (which is the ultimate parent company of the plaintiff, see para. [5] above).

[26] On 13 September 2013, the plaintiff issued a notice of inquiry to the defendant informing him that a Board of Inquiry would be convened to consider the following allegations (reproduced below):

> 1. That you have acted negligently and/or in breach of your fiduciary duty in your handling of the transactions concerning Lotus Paints Sdn. Bhd. ("Lotus") and Cosmo Painters Sdn. Bhd. ("Cosmo"). Your acts and/or omissions in that regard have caused and/or contributed to the following:
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> …
>
> 2. By acting as you had done above, you had failed to act in a forthright manner towards your immediate superiors and/or the Board of Directors in your disclosures to them. In that you had failed to render due and candid disclosures of the matters set out in para 1 above and material developments arising therefrom.
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> 3. You have failed at all material times to disclose that you had become a cheque signatory for Cosmo and Lotus. This undisclosed role that you had assumed raises serious questions against your independence and judgment and given the extent of your dealings with these parties and their principals which were likewise not disclosed to your superiors or the Board of Directors.

[27] The plaintiff carried out a domestic inquiry against the defendant on 19 and 20 September 2013. The domestic inquiry panel found the defendant guilty of all the above charges against him.

[28] The plaintiff sent the defendant a notice of dismissal on 27 September 2013 to dismiss him from employment with immediate effect.

[29] As at 29 October 2013, the amount owed by Cosmo to the plaintiff was RM16,389,788.71. Cosmo and Lotus were wound up in 2015 and their guarantors, So Hwee Cheng and So Chai Chueh, were made bankrupt in 2016. Therefore the plaintiff suffered that amount as irrecoverable losses.

[30] The plaintiff in a letter from the plaintiff's solicitors, namely The Chambers of R Sivagnanam dated 1 November 2013, requested the defendant to make a proposal to compensate the plaintiff for the losses caused by the defendant's failings, to be submitted on or by 8 November 2013.

[31] In a letter dated 14 November 2013, the defendant replied through his solicitors Messrs P. Kuppusamy & Co. He maintained that he was dismissed without just cause or excuse. He further asserted that before his dismissal, he was negotiating with Cosmo to recover the monies owing to the plaintiff and this was within the knowledge of the plaintiff. Therefore the defendant refused to make any proposal for compensation.

[32] The plaintiff filed this claim against the defendant to reclaim the losses it suffered as a result of the defendant's breach of fiduciary duties.

[33] The defendant counterclaimed for the losses he suffered when his employment was terminated by the plaintiff. However, the High Court struck out the defendant's counterclaim on 17 February 2016.

[34] The plaintiff submitted that the defendant had 13 years of experience in the plaintiff's group of companies before he was dismissed. In addition, the defendant was a qualified chartered accountant. The plaintiff relied on the defendant's vast knowledge and experience to assert that the court should hold the defendant to a high standard as the plaintiff's CEO.

[35] In his defence, the defendant asserted that he had complied with the plaintiff's credit policy in his dealings with Cosmo as at the material time, there was no limit on what he could approve. (Subsequently, the plaintiff imposed a limit upon him.) Further, the defendant claimed to have relied on the work done by his subordinates, ie, the sales personnel, the Credit Manager and the General Manager, to check the documents submitted by Cosmo before he approved Cosmo's applications.

[36] The defendant attempted to deflect blame by submitting that both Cosmo and Lotus were recommended to the plaintiff by the plaintiff's General Manager, Marvis Yeoh, while the admission of Cosmo and Lotus as customer and supplier respectively was approved by the plaintiff's former CEO, one Chin Yung Ngok. Further, he claimed that it was the General Manager supported by the Credit Manager, Hue Teck (PW3), who recommended that the credit term and credit limit could be increased. They did so based on the fact that Cosmo had secured big contracts and two of Cosmo's directors provided personal guarantees.

[37] The plaintiff raised the fact that although Lotus and Cosmo were introduced to the plaintiff in 2006 which was prior to the defendant's tenure as CEO, the defendant was the plaintiff's financial controller at that time. The plaintiff asserted that the defendant was instrumental in the admission of Lotus and Cosmo as supplier and customer respectively because since 2004, the defendant had the task of vetting all applications for the admission of new customers.

[38] Besides that, the plaintiff's credit policy stipulated certain documents which are a prerequisite for the defendant to vet such applications. The internal audit found that many of the requisite documents were not submitted together with Cosmo's 'New Customer Details' form. The defendant did not challenge the non-existence of such documents but instead contended that there were instances where other customers could not provide all the documents listed in the credit policy. This raised a doubt as to whether the defendant had sufficient supporting documents for the purposes of evaluating Cosmo's application for admission as a new customer.

[39] The plaintiff's credit policy included guidelines to evaluate a potential customer's creditworthiness, called the '5C's credit evaluation tools' as set out below:

(a) Character;

(b) Capacity;

(c) Conditions;

(d) Capital; and

(e) Collateral.

[40] The defendant argued that the plaintiff also had approved credit terms for other customers without sufficient supporting documentation. Therefore it was not only Cosmo that secured an extension of credit limit.

[41] The plaintiff raised the issue that the defendant had created new customer codes for Cosmo. The defendant contended that first of all, the plaintiff's credit policy did not prohibit such creation of codes, secondly that such codes were created for other customers, and that finally, the fault lies with the General Manager who instructed the Credit Manager's subordinate staff to create such codes without copying to the plaintiff.

[42] The High Court found the defendant was in breach of his fiduciary duties and the plaintiff had proved that it suffered the sum of RM16,389,788 as losses. Therefore the High Court allowed the plaintiff's claim. The defendant appealed to the Court of Appeal.

Our Decision

[43] We have perused the appeal records and considered the submissions of learned counsel. The plaintiff's claim is essentially premised on breach of fiduciary duty by the CEO of the company. The position in law of CEO is one of a fiduciary. Section 132 of the Companies Act (CA) 1965 prior to the recent amendments sets out in statutory form the duties of a director. The defendant in the instant case is not a director of the Board of Directors of the plaintiff. The designation of 'Executive Director' denotes in the instant case,

A the name given to the position to which the defendant was appointed. The defendant however remained an employee at all material times. It appears that learned counsel for both the plaintiff and the defendant failed to appreciate the distinction between an employee who is appointed to a position called 'Executive Director' and a director on the Board of Directors. B In the circumstances therefore, s. 132 which is specifically for directors is not applicable for an employee such as the defendant. However, as the defendant in his capacity as the CEO assumes a fiduciary position, the common law in relation to the duties and obligation of a fiduciary remains wholly relevant. As such the authorities relied upon by the parties are C inapplicable, strictly speaking.

[44] In *Concise Principles of Company Law in Malaysia*, 2nd edn. (2010), Lexis Nexis, the learned authors stated as follows:

> Fiduciary duties are imposed on persons who are involved in the management of a company. This obviously includes directors. The D definition of a 'director' also includes persons other than directors, to whom the board has delegated managerial duties and other persons who act as a director even though they have not been validly appointed … It is therefore necessary to distinguish between persons involved in management and mere employees.
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> E Persons taking part in the management of a company have authority to act in an independent and significant manner and are not subject to the close supervision and control of others more senior in the company hierarchy. At common law, only persons holding a senior management position, owe duties similar to directors: *Green v. Bestobell Industries Ltd* [1982] WAR 1.

F **[45]** In *Labour Law* by Simon Deakin and Gillian S Morris, 5th edn (2009), Hart Publishing, the learned authors stated as follows:

> (ii) Employees as Fiduciaries
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> 4.110 The implied duty of fidelity operates as a term of the contract of G employment, which arises as an incident of the employment relationship; it must therefore be distinguished from the separate notion of a fiduciary obligation which may (added: be) incurred by an employee to his or her employer. Only employees who undertake particular duties and responsibilities, normally associated with a senior position, will become fiduciaries and thereby assume the wide-ranging legal duties which are H attached to that status. In particular, fiduciaries come under an open-ended duty of disclosure which is not part of the employee's general duty of fidelity under the contract of employment.

I

[46] In the Queen's Bench Division case of *University Of Nottingham v. Fishel and Another* [2000] ICR 1462 ('*Fishel*'), Elias J considered the position of employees and in what situations they owed fiduciary duties. His Lordship cautioned against conflating and confusing the regular duties owed by employees to the company with the fiduciary duties owed by certain employees. His Lordship stated as follows:

> The employment relationship is obviously not a fiduciary relationship in the classic sense. It is to be contrasted with a number of other relationships which can readily and universally be recognised as "fiduciary relationships" because the very essence of the relationship is that one party must exercise his powers for the benefit of another. Trustees, company directors and liquidators classically fall into this category which Dr. P. D. Finn, in his seminal work on fiduciaries Fiduciary Obligations (1977), has termed "fiduciary offices." As he has pointed out, typically there are two characteristics of these relationships, apart from duty on the office holder to act in the interests of another. The first is that the powers are conferred by someone other than the beneficiaries in whose interests the fiduciary must act, and the second is that these fiduciaries have considerable autonomy over decision making and are not subject to the control of those beneficiaries.
>
> By contrast, the essence of the employment relationship is not typically fiduciary at all. Its purpose is not to place the employee in a position where he is obliged to pursue his employer's interests at the expense of his own. The relationship is a contractual one and the powers imposed on the employee are conferred by the employer himself. The employee's freedom of action is regulated by the contract, the scope of his powers is determined by the terms (express or implied) of the contract, and as a consequence the employer can exercise (or at least he can place himself in a position where he has the opportunity to exercise) considerable control over the employee's decision making powers. *This is not to say that fiduciary duties cannot arise out of the employment relationship itself. But they arise not as a result of the mere fact that there is an employment relationship. Rather they result from the fact that within a particular contractual relationship there are specific contractual obligations which the employee has undertaken which have placed him in a situation where equity imposes these rigorous duties in addition to the contractual obligations.* Where this occurs, the scope of the fiduciary obligations both arises out of, and is circumscribed by, the contractual terms; it is circumscribed because equity cannot alter the terms of the contract validly undertaken. The position was succinctly expressed by Mason J in the High Court of Australia in *Hospital Products Ltd. v. United States Surgical Corporation* (1984) 156 CLR 41, 97 as follows:
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> > That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important

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> because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.

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…

Accordingly, in analysing the employment cases in this field, care must be taken not automatically to equate the duties of good faith and loyalty, or trust and confidence, with fiduciary obligations. Very often in such cases the court has simply been concerned with the question whether the employee's conduct has been such as to justify summary dismissal, and there has been no need to decide whether the duties infringed, properly analysed, are contractual or fiduciary obligations. As a consequence, the two are sometimes wrongly treated as identical: see *Neary v. Dean of Westminster* [1999] IRLR 288, 290 where the mutual duty of trust and confidence was described as constituting a "fiduciary relationship." *Accordingly, in determining whether a fiduciary relationship arises in the context of an employment relationship, it is necessary to identify with care the particular duties undertaken by the employee, and to ask whether in all the circumstances he has placed himself in a position where he must act solely in the interests of his employer. It is only once those duties have been identified that it is possible to determine whether any fiduciary duty has been breached*, as Lord Upjohn commented in *Phipps v. Boardman* [1967] 2 AC 46, 127:

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> Having defined the scope of [the] duties one must see whether he has committed some breach thereof and by placing himself within the scope and ambit of those duties in a position where his duty and interest may possibly conflict. It is only at this stage that any question of accountability arises. … (emphasis added)

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[47] The learned authors of the texbook *Labour Law* considered the case of *Fishel* (above) and commented as follows:

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> If this analysis is correct, it would be inappropriate to attach fiduciary duties of a general kind to an employee solely on the grounds that he or she owes duties of trust and confidence to the employer. The issue becomes instead one of determining when 'within a particular contractual relationship there are specific contractual obligations which the employee has undertaken which have placed him in a situation where equity imposes [on him] these rigorous [fiduciary] duties' (per Elias J in *Fishel*). The introduction of a fiduciary element into the relationship is not dependent on the seniority of the employee concerned, since the most junior of employees can be entrusted with the employer's property in such a way as to give rise to a specific obligation to restore it (together with any secret profits that may have been made through its use). *Nevertheless, very senior employees who are in a position of special trust and responsibility with regard to the management of the employer's organisation and assets will almost necessarily incur extensive fiduciary duties to the employer.* (emphasis ours)

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I

[48] The defendant, as the plaintiff's CEO, would certainly fall into the category of very senior employees who are in a position of special trust and responsibility with regard to the management of the organisation and assets. The defendant thus owes fiduciary duties to the plaintiff, which we found that he had breached.

[49] From the circumstances in this case, we were in agreement with the finding of the learned judge that the defendant had breached his fiduciary duties. We were of the view that the relationship between the defendant and the two companies, Lotus and Cosmo, indicates a conflict of interest. When the actions of the defendant are scrutinised, he is found to have made decisions which were not impartial and not in the best interest of the company.

[50] The plaintiff contended that the defendant did not exercise good business judgment in approving the applications of Cosmo for an increase of credit term and credit limit because in Cosmo's application form, Cosmo declared that it had assets of only RM40,000 in 2010. When the plaintiff cross-examined the defendant on the approvals, the defendant could not conclusively state that he viewed Cosmo's applications. We agree with the plaintiff's submissions that this appears to be negligence on the defendant's part, as this exposed the plaintiff to a risk of Cosmo defaulting on its debt to the plaintiff. And this became a reality.

[51] In addition, the defendant approved the credit term extension on 6 January 2010, a week before Cosmo submitted its formal application for extension on 14 January 2010. There was a handwritten note on the credit extension approval form "will ask him to fill up app form", which supports the conclusion that at the time the defendant increased the credit term for Cosmo, he did so without referring to any supporting documentation. Nor was there any attempt made to obtain or review whether there was sufficient basis for an extension of such credit, subsequently.

[52] In cross-examination, the defendant initially insisted that he would have looked at the financial statements of Cosmo when making the credit evaluation. The plaintiff adduced the Companies Commission of Malaysia search of Cosmo to show that Cosmo had not filed any audited accounts since 2006. The defendant then claimed that he looked at the audited accounts of 2006. However, we agree with the plaintiff's submission that the 2006 audited accounts would not be of much relevance to a credit evaluation of the financial strength of Cosmo at the time of the application in 2010.

[53] The plaintiff submitted that if Cosmo did not file audited accounts from 2006 onwards, the defendant should have drawn the inference that Cosmo was a dormant company or at least had financial irregularities. At the time Cosmo was introduced to the plaintiff in 2006, the defendant could not

have known that Cosmo would not file its audited accounts for future years. However, this is a relevant consideration when determining whether the defendant made a sound business judgment to raise Cosmo's credit limit and credit term, because the plaintiff's credit policy stipulates that the defendant must consider the applicant's audited accounts for the two years preceding the time the application was made as well as bank statements for the preceding three months. This was clearly not done.

[54] The defendant has many years of experience and knowledge in the relevant field, so this begs the question why he would overlook the guidelines laid out in the plaintiff's credit policy in approving Cosmo's application. The fact that the defendant at some point in time became a cheque signatory for Cosmo and Lotus, at the very least indicates a conflict of interest with his employment at the plaintiff. The date the defendant became a cheque signatory is unknown because the Cosmo and Lotus Board of Directors' resolutions which named the defendant as their cheque signatory were undated.

[55] During submissions, the defendant did not reply to the issue of his being a cheque signatory for Lotus and Cosmo. In his statement of defence, the defendant merely denied that there was a conflict of interest and asserted that there was no necessity for him to disclose this fact. He also claimed that the accounts for which he was a cheque signatory had been dormant since 2006/2007. We are of the view that this explanation is insufficient to dispel the inference that there was a conflict of interest, especially since the actions taken by the defendant clearly show that the defendant made decisions which benefited Cosmo and Lotus but exposed the plaintiff to a real risk of loss, which materialised when Cosmo and Lotus were wound up and the plaintiff was unable to recover the debt owed by Cosmo to it.

[56] We agree with the plaintiff's submissions that regardless of whether the defendant actually signed any cheques on behalf of Lotus and/or Cosmo, the defendant's position as a cheque signatory shows that he had a close relationship with these two companies. The fact that the defendant neglected to disclose this relationship to the plaintiff leads to the inference that the defendant was not impartial in carrying out his duties as CEO of the plaintiff.

[57] On fiduciary obligations, the Federal Court in the case of *The Board of Trustees of the Sabah Foundation & Ors v. Datuk Syed Kechik Syed Mohamed & Anor* [2008] 1 LNS 100; [2008] 5 MLJ 469 cited the following passage by Millet LJ in the English case of *Bristol and West Building Society v. Mothew* [1988] Ch. 1 ('*Bristol and West Building Society*'):

> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-

> minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit **or the benefit of a third person** without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.
>
> The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty. (emphasis added)

[58] The fact of the defendant holding the post as cheque signatory is in contravention of his common law duty as an employee and gives rise to the presumption that the decisions of the defendant in relation to Cosmo and Lotus were not good business judgments. In attempting to disprove this presumption against him, the defendant asserted that the accounts for which he was a signatory were dormant and that there was no proof of any pecuniary advantage gained by him.

[59] However, the defendant had an interest in Cosmo and Lotus as he was their cheque signatory. It is clear that in this scheme, Cosmo and Lotus benefited while the plaintiff suffered losses. Cosmo and Lotus are third parties and as stated in *Bristol and West Building Society* (above), the defendant should not have acted to benefit a third party without the plaintiff's knowledge.

[60] The defendant attempted to blame his subordinates for not checking the supporting documents properly before passing the forms to him for approval and in addition, requested the court to draw an adverse inference against the plaintiff for not calling his subordinates, the then Managing Director and the Credit Manager, to give evidence. However, a Director is not entitled to put the blame on his subordinates for his bad business judgment as he is the one who owes the company a fiduciary duty to act in the best interests of the company. He may and did delegate the checking of supporting documents to his subordinates but ultimately, as the person who granted approval, the blame for extending the credit term and credit limit Cosmo lies at his feet because it was a decision which he alone had the authority to make.

[61] There should not be an adverse inference drawn against the plaintiff for not calling the then Managing Director and Credit Manager as witnesses because, as submitted by the plaintiff, the case against the defendant does not rest on any conspiracy between the defendant and those persons to gain

personal benefit at the expense of the plaintiff. The plaintiff's case against the defendant is for breach of his fiduciary duties and this can be determined by the court by considering whether the defendant had breached his duty to act in good faith and in the best interests of the company.

[62] The plaintiff contended that the defendant deliberately did not provide Cosmo's debts as doubtful debts for a selfish reason, merely in order to give the impression that the plaintiff company was performing well during the defendant's tenure as the plaintiff's CEO. PW3 testified that the defendant specifically told him to conceal Cosmo's debts. On the other hand, the defendant blamed PW3 as well as his other subordinates for misleading him into granting approval to Cosmo. So the court had to weigh the evidence of two witnesses, both of whom had interests in conflict with each other.

[63] It is appropriate to note at this juncture that PW3 was also investigated by the plaintiff for negligence and/or breach of fiduciary duties in relation to the Lotus and Cosmo transactions but punished with a warning letter. Subsequently, PW3 resigned from the plaintiff on 31 May 2015. Therefore, PW3 has no reason to give evidence favourable to the plaintiff as he is no longer in the plaintiff's employment. As accepted by the plaintiff and stated in the notice of warning dated 14 October 2013 to PW3, PW3's "position was subordinate to that of the Chief Executive Officer and others who may be involved in such transactions." We have no reason to disagree with the learned trial judge that, on the balance of probabilities, it was the defendant who instructed PW3 to conceal Cosmo's debts from the plaintiff. By doing so, the defendant exacerbated the situation and the plaintiff only realised the irregularities in August 2013, when Cosmo's debt had ballooned to RM16,238,280 (being the principal amount plus late payment interest, as stated in the Cosmo ageing list as at 31 August 2013).

[64] In mitigation, the defendant claimed that he had secured not only personal guarantees but also a corporate guarantee from Lotus, and that he had managed to recover some of the debt owed. As to the corporate guarantee and partial debt recovery, there was no evidence of the same before the court. To make matters worse, one of the personal guarantors, Winson Chang, was already bankrupt at the time of signing the guarantee in 2013, and had been bankrupt since 1996.

[65] Therefore, we do not think that the learned judge was plainly wrong in concluding on the totality of the evidence that the defendant had breached his duties as CEO and a fiduciary of the plaintiff company. There was clear loss occasioned to the company by his allowing, what was in effect a financing scheme, for the benefit of Cosmo and to the detriment of the plaintiff company, to be implemented over a considerable period of time. We therefore uphold the trial judge's finding that the defendant as CEO was in breach of his fiduciary duties owed to the plaintiff company as his employer.

[66] However, we are not convinced that the defendant can be said to be solely responsible for the losses of the company stated to be RM16 million plus. This case is unlike other cases where the employee acted in breach of his fiduciary duties and appropriated the company's funds for himself. In such an event, the losses are clearly attributable directly to the acts of the employee and should be ordered to be disgorged. That is not the case here. Several factors go into assessing the cause for the losses stated to be suffered by the plaintiff company, particularly the role played by Cosmo and the benefit received by it.

[67] As an employee, unless it can be established that he acted dishonestly and enjoyed pecuniary gains as a result of his misconduct, there is no legal basis to hold him liable for the totality of the losses that was not the thrust of the charges preferred against him; neither were such clear findings of fact made against him by the domestic inquiry panel. In the absence of such evidence, the defendant's liability for the entirety of the losses is not made out. On liability alone, this aspect of the claim for damages is not established.

[68] The plaintiff also has not produced evidence as to whether the defendant had allegedly made as profit or personal gains from the transactions with Cosmo and Lotus. The defendant pointed to the fact that during the cross-examination of the internal auditor (PW1), PW1 admitted that the plaintiff's revenue for the financial year 2012 was almost RM600 million and about RM550 million for the year before that. This meant that there was an increase in profitability between 2011 and 2012, after the defendant approved the increase in credit term and credit limit to Cosmo. Therefore, we were of the view that the learned judge erred in directly attributing the losses claimed solely to the defendant.

[69] Further, as we have stated above, on the face of the matter, the party that directly benefited from the transactions here was not the defendant but Cosmo and Lotus. There is no evidence of the defendant obtaining any pecuniary advantage by assisting Cosmo and Lotus to perpetuate this "scheme". There is also no suggestion of the defendant siphoning any of the money paid by the plaintiff to Lotus.

[70] The learned judge based his finding that the plaintiff suffered losses amounting to RM16,389,788 on the defendant's purported admission that this amount was suffered as loss due to his action of approving Cosmo's orders even though Cosmo had exceeded the credit limit.

[71] As submitted by counsel for the defendant, during the trial, the learned judge had allowed the defendant's objection to the admission of source documents ie, invoices which could prove that the plaintiff suffered the said amount as losses caused by the defendant's breach of fiduciary duties. Since the source documents were not allowed to be introduced in evidence, then

the plaintiff could not have proved that it suffered that sum as losses. The learned judge merely stated in the grounds of judgment that the plaintiff had proved this sum as losses but did not refer to any documents in support of this finding. The only document before the court was the debtor's statement which stated the principal amount owing from Cosmo at the material time, but since the invoices which purportedly supported this figure were not allowed to be admitted as evidence before the court, the principal sum remained a mere statement.

[72] Further, even if such invoices had been admitted in evidence, it does not follow that the defendant alone is solely liable for the losses suffered for the reasons set out above in paras. [69]-[70]. The plaintiff did not prove that as a fiduciary, the defendant was in possession of monies belonging to the company which warranted the imposition of a 'constructive trust' against him such that he was impelled to disgorge such profit in his possession.

[73] We therefore set aside that part of the judgment awarding RM16,389,788.71 by way of damages to the plaintiff. In other words, we grant a declaration that defendant has breached his express and/or implied duties and/or fiduciary duties to the plaintiff, but we find that the plaintiff has not established the losses claimed in the sum of RM16,389,788.71.

Note

[74] For completion, we note that the defendant has filed a claim for wrongful dismissal and that complaint was pending in the Industrial Court at the time of our decision.

Conclusion

[75] The appeal was therefore dismissed, save that the order of the High Court was varied to the extent that the losses claimed were not allowed. No order was made as to costs. The deposit was refunded.